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No. 10-791

Supreme Court, U.S.
FILED
JAN 12 2011
OFFICE OF THE CLERK

In The Supreme Court of the United States

REDERIET OTTO DANIELSEN, A.S.; K.S. SHIPPING,

Petitioners,

v.

BRIAN STACY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF WASHINGTON DEFENSE TRIAL LAWYERS IN SUPPORT OF PETITIONERS

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AMICUS CURIAE BRIEF OF WASHINGTON DEFENSE TRIAL LAWYERS

Washington Defense Trial Lawyers ("WDTL") respectfully submits this *amicus curiae* brief, on behalf of itself and its members, in support of Rederiet Otto Danielsen's petition for a writ of certiorari. Pursuant to Supreme Court Rule 37.2(a), this *amicus curiae* brief is filed with the consent of all the parties.[1]

STATEMENT OF INTEREST

WDTL is an organization of trial lawyers in the State of Washington. The organization is devoted, among other things, to the protection of the interests of defendants in civil litigation. Many of WDTL's members concentrate their practices in admiralty and maritime law.

[1] Pursuant to Supreme Court Rule 37, letters indicating WDTL's intent to file this *amicus curiae* brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this brief. Finally, WDTL affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case demonstrates the pressing need for establishment of a test that appropriately limits a claim of negligent infliction of emotional distress under the general maritime law of the United States. This Court's decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547-548 (1994), established the standard for negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1908) (hereinafter "FELA"). FELA created the duty of care between an employer and employee, and establishes causes of action for employer negligence. FELA has been incorporated into the Jones Act, 46 U.S.C. § 30104, which is applicable to claims by maritime employees against their employers. *The Arizona v. Anelich*, 208 U.S. 110, 118 (1935); *Cox v. Roth*, 348 U.S. 207 (1955). *Gottshall* has been relied upon by lower courts in defining and delimiting the scope of emotional distress claims brought by seamen against their employers pursuant to the Jones Act. *See, e.g., Szymanski v. Columbia Transp. Co., a Div. of Oglebay-Norton Co.*, 154 F.3d 591, 596 (6th Cir. 1998) (applying *Gottshall* to seaman's claims); *Sloan v. U.S.*, 603 F. Supp. 2d 798, 807-808 (E.D.Pa. 2009) (same). Lower courts have also relied upon *Gottshall* when seeking guidance regarding the contours of negligent infliction cases under U.S. general maritime law. *See, e.g., Smith v. Carnival Corp.*, 584 F. Supp. 2d 1343, 1354 (S.D.Fla. 2008) (applying *Gottshall* to general maritime law claims of passengers). Hence, the *Gottshall* test, initially

developed for FELA cases, has expanded into other significant areas of the law.

In *Gottshall*, this Court adopted the "zone of danger" test, allowing recovery for purely emotional harm caused by employer negligence to "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 512 U.S. at 547-548. *Gottshall*, however, is limited to negligence claims under FELA and, by extension, to the Jones Act, by an employee against his or her employer. Neither *Gottshall*, nor any other decision of this Court has established, the parameters of a cause of action for negligent infliction of emotional distress arising under the general maritime law beyond the employer-employee context. As a result, there is no uniform admiralty rule applicable to negligent infliction of emotional distress claims occurring on the navigable waters of the United States, or on U.S. flagged vessels, beyond the employer-employee context. A uniform federal rule fashioning the elements and setting the limits of a general maritime law cause of action for negligent infliction of emotional distress is both desirable and necessary. *See, e.g.*, *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 409 (1953); *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961). Certiorari is particularly appropriate in this case to establish such a uniform rule. Where, as here, the cause of action is purely judge-made and there are no applicable acts of Congress, this Court is uniquely empowered to determine the federal

maritime common law. *See Atlantic Sounding Co., Inc. v. Townsend*, ___ U.S. ___, 129 S. Ct. 2561, 2575, n.11 (2009) (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271 (1979)).

Assuming the "zone of danger" test is, in fact, applicable to a general maritime law claim for negligent infliction of emotional distress, clarification of the elements of this test is critical. Although this Court's decisions in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) and *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), refined the "physical impact" prong of the *Gottshall* standard, the Court has not had occasion to provide guidance on the "zone of danger" prong. For example, the Ninth Circuit had previously held that the "zone of danger" test required that the plaintiff witness harm to another and while simultaneously being personally threatened with physical harm. *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir. 1994). Various district courts agree. *See, e.g., Kunkel v. Motor Sport, Inc.*, 349 F. Supp. 2d 198 (D.P.R. 2004); *Williams v. Carnival Cruise Lines, Inc.*, 907 F. Supp. 403 (S.D. Fla. 1995). Conversely, the Ninth Circuit's decision in *Stacy v. Rederiet Otto Danielsen, A.S.*, 609 F.3d 1033 (9th Cir. 2010), creates confusion over whether the "zone of danger" test required the plaintiff to have observed harm to another caused by the defendant's negligence.

In *Gottshall*, the Court noted that the "zone of danger" standard limited recovery to workers who suffered emotional injury "caused by fear of physical

injury" to themselves. 512 U.S. at 556. Moreover, most common law decisions agree that "fear of physical injury" both serve as the basis for the "zone of danger" test and delineates the emotional distress for which a plaintiff may recover. In sharp contrast, the Ninth Circuit's decision in *Stacy* liberally expanded the elements of the "zone of danger." Plaintiff, Stacy, and petitioner prudently arranged through the timely use of radar and radio to pass each other safely as their respective vessels operated in a fog bank near San Francisco. It is undisputed that Stacy was no longer in the zone of danger and was safely out of harm's way when the petitioner's vessel passed. Further, Stacy was not within the zone of danger when he learned four days later that Captain Wood, the captain of another vessel some distance away, had been killed when his vessel collided with petitioner's and was sunk. While this revelation may have cast Stacy's earlier interaction with petitioner's vessel in a new light, his belated conclusion that he too could have been in a collision and killed, cannot be permitted to satisfy the "zone of danger" test. In neither a temporal nor a physical sense was Stacy in the same danger zone that Captain Wood and his vessel occupied. Unless more is required in order to satisfy the general maritime "zone of danger" rule than the Ninth Circuit required in *Stacy*, the potential list of claimants could be endless. The *Stacy* decision therefore places the Ninth Circuit in direct conflict with numerous federal maritime decisions and state common law precedent holding that contemporaneous

fear is the touchstone of a claim for negligent infliction of emotional distress.

Since *Gottshall*, this Court has recognized the need to circumscribe the scope of liability for emotional distress under the "zone of danger" test. *See Buckley*, 521 U.S. at 238 ("Here the relevant question concerns not simply recovery in an individual case, but the consequences and effects of a *rule of law that would permit that recovery*.") (emphasis in original). The Ninth Circuit's holding below departs from this maxim and well-considered common law decisions from around the nation, and threatens to expand the class of emotional distress claimants exponentially.

These issues are too important to remain unresolved, and this case is an excellent vehicle to resolve them. WDTL therefore urges the Court to grant Rederiet Otto Danielsen's petition for certiorari.

ARGUMENT

A. The Court Should Adopt a Uniform Standard Governing FELA, Jones Act and General Maritime Law Claims for Negligent Infliction of Emotional Distress.

This Court's decisions in *Gottshall*, *Buckley* and *Ayers* construed the liability standard for FELA and Jones Act employers for negligent infliction of emotional distress upon their employees; however, this Court has not adopted a rule for general maritime law claims for negligent infliction of emotional

distress. *See Zorrilla-Balseiro v. Marina Puerto Chico, Inc.*, Case No. 08-1183CCC, 2009 WL 866867 (D.P.R. March 30, 2009) (noting that "this Court has not specifically adopted the 'zone of danger' test in maritime cases," but finding it "unnecessary to decide which test to adopt"); Alberto Struck, *The Current State of Affairs for Claims of Negligent Infliction of Emotional Distress under the Jones Act and the Federal Employer's Liability Act*, 30 Tul. Mar. L.J. 353, 362 (2006) ("Although acknowledging that recovery for negligently inflicted emotional distress is actionable under both FELA and the Jones Act, the First Circuit has yet to adopt a specific threshold standard for application of emotional distress injuries."). Indeed, while some courts have applied the "zone of danger" test to general maritime law claims brought by passengers, *e.g.*, *Smith v. Carnival Corp.*, 584 F. Supp. 2d 1343, 1353-54 (S.D.Fla. 2008), several considerations suggest that the "zone of danger" test as formulated and adopted in *Gottshall* may not be applicable outside of the employment context.

The Court's *Gottshall* opinion is salted with considerations relying upon FELA and its underlying public policy. 512 U.S. at 542 ("First, as in other cases involving the scope of the statute, we must look to FELA itself, its purposes and background. . . ."). For example, FELA was enacted to serve the "humanitarian purposes" of protecting railroad employees, and to provide compensation for "the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year." *Id.*

As a result, the courts "have liberally construed FELA to further Congress' remedial goal." *Id.* at 543. Similarly, the Jones Act governs employers' liability to employees for injuries in the marine context and extends protection to seamen as wards of the Court. 46 U.S.C. § 30104. Like FELA, the Jones Act provides "heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the 'perils of the sea.'" *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (quoting G. Gilmore & C. Black, *Law of Admiralty* § 6-21, pp. 328-329 (2d ed. 1975)). Thus, the "humanitarian" and "remedial" public policies of FELA, applied in *Gottshall*, might well support application of the "zone of danger" test in cases where an injured seaman sues his employer under the Jones Act. However, the Jones Act's protective policies are inapplicable to general maritime negligence claims arising outside of the employment context. Moreover, the *Gottshall* Court's central assumption – that family members would rarely witness harm to one another in the FELA employment context – which led it to adopt the "zone of danger" test, is inapplicable to general maritime emotional distress claims whose defining feature is that they occur upon navigable waters, and not that they arise in an employment setting.

The lack of any clear, uniform rule is evident in the case law. In *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002), the Ninth Circuit observed that although claims for emotional distress are "cognizable under admiralty law, there appears to be no

established maritime standard for evaluating such claims." *Id.* at 841 (disposing of intentional infliction of emotional distress claim). As a result, the specific elements of the "zone of danger" test are inconsistent among the lower courts. For example, there is a split among the circuits and there are discordant holdings in passenger cases concerning whether the "zone of danger" test requires an objective physical manifestation for recovery. *See Tassinari v. Key West Water Tours, L.C.*, 480 F. Supp. 2d 1318, 1321 (S.D.Fla. 2007) ("There is conflicting case law on whether the zone of danger test includes a physical manifestation requirement in maritime law."). In *Williams v. Carnival Cruise Lines, Inc.*, 907 F. Supp 403, 407 (S.D.Fla. 1995) a Florida court held that unless a physical manifestation was shown, a passenger could not recover for emotional distress under the "zone of danger" test, relying upon the First, Second, and Fifth Circuits. *Id.* (citing *Petition of the United States*, 418 F.2d 264 (1st Cir. 1969); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2nd Cir. 1961); *Ainsworth v. Penrod Drilling Co.*, 972 F.2d 546 (5th Cir. 1992)). *See also Carrier v. Jordaan*, ___ F. Supp. 2d ___, 2010 WL 3743649 (S.D.Ga. Sept. 22, 2010) (slip copy) (holding that "[a]lthough the law is somewhat unsettled, a 'physical manifestation of emotional injury' must generally be present where there is no physical impact"); *Tassinari*, 480 F. Supp. 2d at 1324-25 (imposing "physical manifestation" requirement).

Other courts, however, have rejected the physical manifestation requirement. *E.g.*, *Jones v. CSX*

Transp., 337 F.3d 1316, 1317 (11th Cir. 2003) (per curiam); *Hutton v. Norwegian Cruise Line Ltd.*, 144 F. Supp. 2d 1325, 2001 A.M.C. 2456 (S.D. Fla. 2001); *Complaint of Clearsky Shipping Corp.*, Case Nos. Civ.A. 96-4099 *et al.*, 1998 WL 560347 (E.D.La. August 28, 1998). This Court should, therefore, grant certiorari to formulate a clear test under the general maritime law for claims of negligent infliction of emotional distress.

B. This Case Presents an Opportunity to Clarify the Elements of the "Zone of Danger" Test.

The Court should use this case to clarify whether the "zone of danger" test includes a "physical manifestation" element. Certiorari in this case would also resolve several other points of dispute among the lower courts regarding application of the "zone of danger" test.

1. The Court should clarify whether contemporaneous fear is required under the "zone of danger" test.

In *Gottshall*, this Court noted that under the "zone of danger" test "a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury, whereas a worker outside the zone will not." 512 U.S. at 556. In other words, "those within the zone of danger can recover for fright, and those outside of it

cannot." *Id.* at 548 (internal quotation marks omitted). Other federal courts have gone further, holding that under FELA, a plaintiff within the zone of danger may recover *only* emotional damages caused by fear for his own safety, and not for other emotional injuries proximately caused by the defendant's alleged negligence. *Marschand v. Norfolk and Western Ry. Co.*, 876 F. Supp. 1528, 1535 (N.D. Ind. 1995). *But see Dobelle v. National R.R. Passenger Corp.*, 628 F. Supp. 1518 (S.D.N.Y. 1986) (holding that once a plaintiff is in the "zone of danger," she can recover for all emotional injury, not simply fear for own safety). To the extent that this Court did not unequivocally hold in *Gottshall* that recovery under the "zone of danger" test requires the plaintiff to contemporaneously fear for his or her safety and to recover for *that* fear, it should take this opportunity to clarify the standard, lest the cause of action be opened to all who later realize the danger they were in despite being unaware until after they pass out of the zone or after the danger passes them by.

The Ninth Circuit's refusal to require a plaintiff either to plead or prove fear for his or her own safety places it in conflict with the numerous common law cases holding that fear for the plaintiff's own safety while in the "zone of danger" is an essential element of the "zone of danger" test. *See, e.g., Kapoulas v. Williams Ins. Agency, Inc.*, 11 F.3d 1380, 1382 (7th Cir. 1993) ("[E]ven though the Illinois Supreme Court desired to permit certain bystanders to recover for emotional distress, it correspondingly intended to

limit the class of unimpacted or uninjured bystanders to those who could demonstrate a fear for their own safety"); *Maldonado v. Nat'l Acme Co.*, 73 F.3d 642, 645 (6th Cir. 1996) (noting that Michigan abolished the "zone of danger" test because "the zone-of-danger concept presupposes that a plaintiff will be close enough to the tortious activity to fear a physical impact") (quoting *Toms v. McConnell*, 45 Mich. App. 647, 207 N.W.2d 140, 144 (1973)). *See also Robb v. Pennsylvania R.R. Co.*, 58 Del. 454, 464-465, 210 A.2d 709 (1965) (holding where symptoms of emotional distress "are proximately caused by fright due to negligence, recovery by one in the immediate zone of physical risk should be permitted"); *Williams v. Baker*, 572 A.2d 1062, 1073 (D.C. 1990) (holding that "zone of danger" test "allows recovery for mental distress as long as the plaintiff was in the zone of physical danger and as a result feared for his or her own safety because of defendant's negligence"); *Carlson v. Illinois Farmers Ins. Co.*, 520 N.W.2d 534, 536 (Minn. App. 1994) ("Only damages for distress arising from the plaintiff's fear for her own safety are recoverable"); *see also Rickey v. Chicago Transit Auth.*, 98 Ill.2d 546, 75 Ill.Dec. 211, 457 N.E.2d 1, 5 (1983); *Shelton v. Russell Pipe & Foundry*, 570 S.W.2d 861, 864 (Tenn. 1978); *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157, 169 (1992) (abolishing zone of danger test as too restrictive because it only permits recovery for emotional damages suffered as a result of fear for one's own safety); *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis.2d 627, 517 N.W.2d 432 (1994) (same). As such, the Ninth Circuit's opinion represents a

significant departure from, and expansion of, the common law.

This case is a particularly appropriate vehicle for clarifying the "zone of danger" test because, as Judge Hall pointed out in dissent, at no point in his complaint did Mr. Stacy allege that he suffered "fear for his own safety" while in the alleged zone of danger. *Stacy*, 609 F.3d at 1044. *See also* Amended Complaint, ¶ 22 ("Plaintiff was placed in grave and imminent risk of death or great bodily harm, and as a result suffered and continues to suffer great physical, mental, and nervous pain and suffering, stress and anxiety. . . ."). The Complaint at ¶ 12 also stated that Petitioner's vessel while a mile distant, took evasive action, altered course to avoid Respondent's vessel and passed safely. Although Respondent alleges that he heard the engines and could hear the vessel's engines in the fog and felt its wake, notably he does not allege that his fishing boat was affected at all. Any possible danger to Respondent had dissipated before the Eva Danielsen passed the fishing vessel. Respondent was able to participate later in the search for another victim, and then resumed fishing. Amended Complaint, ¶¶ 15, 24. Significantly, Respondent did not even hear about the death of Captain Wood until four days later, long after the event.

The Ninth Circuit's analogy of Respondent's allegations of "great physical, mental, and nervous pain and suffering, stress and anxiety" (which it shortened to "emotional distress") with "fright," *Stacy*, 609 F.3d

at 1035, threatens to dilute or eliminate the Court's suggestion in *Gottshall* that fear for one's safety is the touchstone for the "zone of danger" test. As Judge Hall observed, "it is perfectly understandable that [Respondent] . . . might suffer great psychic trauma upon learning, after the fact, that one of their fellow fishermen died after being tossed into the ocean as a result of a collision with the freighter." *Stacy*, 609 F.3d at 1044. This suffering may be worse for Respondent who also feels guilt over the death of his fellow fisherman because without the freighter's course deviation to avoid his own boat, it might not have collided with the *Buona Madre* and Captain Wood. *See* Amended Complaint, ¶ 12. This guilt could be compounded by the knowledge that the search was called off after Respondent informed the fleet that his boat had not been impacted. *See Stacy*, 609 F.3d at 1044. However, after-the-fact guilt is not synonymous with contemporaneous fear for one's safety, and the Court should grant certiorari to clarify whether the former may support a claim for negligent infliction of emotional distress, or whether the latter is required.

2. Certiorari is necessary to resolve latent ambiguity in *Gottshall* regarding whether the "zone of danger" test requires the plaintiff to witness harm to a third person.

As demonstrated by Petitioner, the Ninth Circuit's decision not to require a plaintiff alleging negligent infliction of emotional distress to witness

an accident places it in conflict with numerous courts across the country. Petition, pp. 12-17. *See also Fernandez v. Aliff*, 2008 A.M.C. 891, 2008 WL 2026010 (D.P.R. 2008) ("Neither the Jones Act, 46 U.S.C. § 688, nor general maritime law, authorizes recovery for emotional distress caused by witnessing a victim's injury where the plaintiff did not at least *witness the accident* where the victim was injured") (emphasis in original) (citing *Kunkel v. Motor Sports*, 349 F. Supp. 2d 198, 206 (D.P.R. 2004); *Yballa v. Sea-Land Services., Inc.*, 919 F. Supp. 1428, 1425 (D. Haw. 1995); *Williams*, 907 F. Supp. at 406); *Peemoller Sultan v. Pleasure Craft Contender*, 139 F. Supp. 2d 230, 237 (D.P.R. 2001) ("Under the 'zone of danger' standard, a plaintiff need not experience physical injury or impact to recover damages so long as the plaintiff witnesses the endangerment of another and is also placed at risk of physical injury due to the defendant's negligence"); *Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436, 442 (E.D. La. 1993) (holding that plaintiff "must have feared at the time of the incident that his life or person was in danger"). Although *Gottshall* did not require the Court to decide whether "witnessed harm" was a required element under the "zone of danger" standard, its formulation of the standard neither included nor rejected such a requirement. 512 U.S. at 547-548 (approving recovery for "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.").

This ambiguity was deepened by the fact that many state court decisions upon which the *Gottshall* Court relied held that recovery for negligent infliction of emotional distress under the "zone of danger" standard requires that the plaintiff witness an injury to a third person. *See, e.g.*, *Keck v. Jackson*, 122 Ariz. 114, 115, 116, 593 P.2d 668 (Ariz. 1979) ("[D]amages for shock or mental anguish at witnessing an injury to a third person, occasioned by a defendant's negligence, are recoverable" but "the plaintiff/bystander must himself have been in the zone of danger"); *Williams v. Baker*, 572 A.2d 1062, 1064 (D.C. 1990) ("[O]ne may recover for emotional distress caused by witnessing injury to an immediate family member only if the claimant was in the zone of physical danger and as a result feared for his or her own safety") (internal footnote omitted); *Rickey*, 98 Ill.2d at 555, 457 N.E.2d 1 ("This rule . . . does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact"). Even the Ninth Circuit was somewhat unsure of their value. *Stacy*, 609 F.3d at 1036 ("*Gottshall* cited those cases. It did not endorse them.").

Moreover, a "witnessed harm" requirement is consistent with this Court's repeated pronouncements that liability for emotional distress must be strictly limited. *See, e.g.*, *Gottshall*, 512 U.S. at 546 (noting its care to avoid "the very real possibility of nearly infinite and unpredictable liability for defendants"); *Ayers*, 538 U.S. at 147 (describing liability for

emotional distress as "sharply circumscribed by the zone-of-danger test"). And because this Court's subsequent FELA emotional distress cases dealt with the "physical impact" prong of *Gottshall*, and not the "zone of danger" standard, the Court has had no occasion to clarify this issue. Here, without action by this Court, the class of potential plaintiffs has expanded to include all persons who happened to be within the zone of some danger, regardless of whether they experienced contemporaneous fear or even appreciated the nature of their danger until much later. This is the very form of liability without end that the Court and other courts have long sought to avoid.

CONCLUSION

Amicus WDTL respectfully submits that this Court should grant Rederiet Otto Danielsen's petition for a writ of certiorari to establish the parameters of negligent infliction of emotional distress under the general maritime law beyond the maritime employment context.

Respectfully submitted,

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January 11, 2011